**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1384**

State of Minnesota,
Respondent,

vs.

Humberto Acevedo, Jr.,
Appellant.

**Filed August 13, 2018**
**Affirmed**
**Johnson, Judge**

Swift County District Court
File No. 76-CR-17-43

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Danielle Olson, Swift County Attorney, Benson, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Kate M. Baxter-Kauf, Rachel A. Kitze Collins, Special Assistant Public Defenders, Lockridge Grindal Nauen P.L.L.P., Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Reyes, Judge.

## U N P U B L I S H E D  O P I N I O N

**JOHNSON**, Judge

A Swift County jury found Humberto Acevedo, Jr., guilty of first-degree controlled substance crime based on evidence that he sold one ounce of methamphetamine to a confidential informant. We conclude that the evidence is sufficient to support a finding that Acevedo was not entrapped and, thus, is sufficient to support the jury's guilty verdict. We also conclude that the district court did not plainly err by allowing the state to introduce other-acts evidence to prove Acevedo's predisposition to commit the offense. We further conclude that Acevedo is not entitled to a new trial on the ground that his trial attorney provided him with ineffective assistance of counsel in violation of the Sixth Amendment. Therefore, we affirm.

## FACTS

In January 2017, a man who had been charged with crimes contacted law enforcement to offer information about persons who were selling methamphetamine. The man offered to cooperate with law enforcement as a confidential informant. The confidential informant then contacted Acevedo repeatedly in an attempt to arrange a sale of methamphetamine. Acevedo initially declined. Later, after learning that Acevedo's car had broken down, the confidential informant offered to lend his car to Acevedo if Acevedo would sell him methamphetamine. Acevedo agreed and told the informant to meet him at Acevedo's home.

The informant contacted law enforcement again and said that he could buy two ounces of methamphetamine from Acevedo for $2,400. An officer met with the informant,

attached a recording and transmitting device to his ankle, gave him $2,400 in cash to make the purchase, and instructed him on how to proceed. The informant drove to Acevedo's home in the city of Murdock and picked up Acevedo and his girlfriend. They drove to the city of Willmar, where Acevedo visited an apartment complex for more than an hour. The informant, Acevedo, and his girlfriend then drove back to Acevedo's home in Murdock. Once inside Acevedo's home, Acevedo handed the informant a baggie containing one ounce of methamphetamine. The informant placed the baggie of methamphetamine in his pickup truck. The informant, Acevedo, and his girlfriend then returned to Willmar, intending to buy another ounce of methamphetamine, but they were unable to make a second purchase. When their attempt failed, the informant pulled his pickup truck into a parking lot and turned on his blinker, which was a pre-determined signal to law-enforcement officers, who then surrounded the pickup truck, found the methamphetamine in the truck, and arrested Acevedo and his girlfriend.

In January 2017, the state charged Acevedo with (1) first-degree controlled substance crime, in violation of Minn. Stat. § 152.021, subd. 1(1) (2016), for selling 17 grams or more of methamphetamine; (2) second-degree controlled substance crime, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2016), for possessing 25 grams or more of methamphetamine; and (3) fifth-degree controlled substance crime, in violation of Minn. Stat. § 152.025, subd. 2(1) (2016), for possessing one or more mixtures containing methamphetamine.

The district court conducted an omnibus hearing on February 24, 2017. Neither party presented any contested issues. Acevedo's attorney advised the district court that she and her client were investigating the possibility of asserting an entrapment defense.

At a pre-trial hearing on March 21, 2017, which was 11 days before trial, the state moved *in limine* for a ruling that it could introduce three prior felony drug convictions for impeachment purposes. The three convictions are an April 2008 conviction of fifth-degree drug possession, a November 2008 conviction of third-degree drug possession, and a March 2012 conviction of fifth-degree drug possession. The district court granted the state's motion, stating

> I will . . . allow . . . the fact of three prior convictions, but I'm not going to allow the State to produce evidence about what the convictions were for. So the fact that they are drug convictions, whether it's sales or possessions will not be permissible, but you can . . . talk about it or you can ask questions about the county of conviction, the date of conviction, and the fact that it's a felony-level conviction, and you'd be limited to those three things.

Acevedo's attorney informed the district court that Acevedo had decided to rely on an entrapment defense at trial. Acevedo's attorney noted that Acevedo still needed to elect whether to present his entrapment defense to the court or to a jury. The district court scheduled a hearing for March 27, 2017, to resolve that issue.

At the March 27 pre-trial hearing, which was one day before trial, Acevedo's attorney informed the district court that Acevedo had decided to present his entrapment defense to the jury. The district court informed Acevedo that he "has the burden to raise the issue of entrapment by presenting a fair preponderance of the evidence for the jury to

consider." The district court stated that if he were to satisfy that burden, the state could present other-acts evidence to prove beyond a reasonable doubt that Acevedo had a predisposition to commit a drug crime. The district court cautioned Acevedo as follows:

> The state is allowed potentially to produce evidence of . . . other past drug offenses for which you might not have received convictions if they have the evidence to do it. It's my understanding from talking in chambers that the State believes they have evidence through the existing confidential informant that he had bought drugs from you in the past, not including the one that you're charged with now. That evidence likely would come in and the jury has to hear that because they're the ones that will have to make the decision whether you're predisposed.

The district court reminded Acevedo of its earlier *in limine* ruling, which limited the use of Acevedo's prior drug convictions to the purpose of impeachment. The district court explained further that if Acevedo raised an entrapment defense, the state would be permitted "to go way, way beyond a felony conviction, when it happened, where it happened" and would be able to "get into the nitty gritty details." The district court warned Acevedo that the state could satisfy its burden of proving predisposition by "[u]sing [Acevedo's] past drug convictions" and by introducing evidence of drug charges of which Acevedo was acquitted.

The case was tried to a jury on the following two days, March 28 and 29, 2017. At the beginning of trial, the state dismissed count 3. The state called three witnesses: a deputy sheriff assigned to a multi-jurisdictional drug task force, an employee of the bureau of criminal apprehension, and the informant. The state's exhibits included excerpts from

audio-recordings of conversations between Acevedo and the informant, both before and after the controlled purchase.

Acevedo called one witness and testified in his own defense. His girlfriend testified that the informant contacted Acevedo frequently, if not daily, for two months, causing Acevedo to turn off his cell phone to avoid the informant's calls. She also testified that the informant sent her a Facebook message asking Acevedo to contact him and that Acevedo then contacted the informant to tell him to stop.

Acevedo testified that the informant called him repeatedly and eventually sent him a text message offering to lend his car in exchange for a sale of drugs. Acevedo testified that the informant knew that Acevedo's car had broken down days earlier and that he was in great need of a car, so Acevedo made arrangements to meet the informant at Acevedo's home.

On cross-examination, the prosecutor questioned Acevedo about certain aspects of his direct-examination testimony, as follows:

> Q: [Y]our intent was to go to Willmar to pick up the additional two ounces?
>
> A: Ah, what [the informant] wanted, yep.
>
> Q: And you were going to sell that to him for $2,400?
>
> A: Well I don't know that's why I – I called my friend, or my supplier and I asked him, you know, what's he gonna charge me, . . . .
>
> . . . .
>
> Q: Okay. And then so when you get the $2,400 and it's only $1,600, you keep the remaining cash then?

A: I believe, yep.

Q: Okay. And then as a seller that's essentially your kind of handling fee that you receive?

A: Well, I'm not a seller, I'm just like the middle man.

After the prosecutor completed her cross-examination, the district court ruled that Acevedo had satisfied his initial burden with respect to his entrapment defense and that the issue would be submitted to the jury. The prosecutor then elected to cross-examine Acevedo further by following up on his earlier testimony:

Q: You indicated you were the middle man . . .

A: Oh, yeah.

Q: What does that mean to you?

A: To me that's a person that would probably give me a call if they needed something, and I'll go get it for them.

Q: Okay. And so then, who do you call?

A: A buddy of mine.

Q: Okay. And was this the same buddy as in this case?

A: Yeah.

Q: Okay. So you refer to him as your supplier. It's somebody that you know you can purchase larger amounts of methamphetamine to then distribute otherwise, correct?

A: I believe, yes.

. . . .

> Q: Okay. And again, the intent was that you'd then pass it to somebody else, . . . and you could make a couple bucks in between?
>
> A: Correct.
>
> Q: Okay. How many occasions do you believe you've done this?
>
> . . . .
>
> A: A few times.
>
> Q: Okay. When you say a few, three or more?
>
> A: I—whenever like I need to make some money 'cause during the winter I don't work. So it's a seasonal job.

The prosecutor also cross-examined Acevedo about a prior incident in which he was arrested for and charged with possession of methamphetamine. Acevedo testified that, one year earlier, a law-enforcement officer found 140 grams of methamphetamine in the glove compartment of a vehicle in which he was a passenger. On re-direct examination, Acevedo testified that the methamphetamine did not belong to him and that he did not know that it was in the glove compartment. He further testified that a jury found him not guilty of the charge.

After the defense rested, the state recalled the informant as a rebuttal witness. The informant testified that, before the controlled purchase, he had purchased methamphetamine from Acevedo on approximately six or seven occasions. He testified further that, on all but one occasion, Acevedo brought the methamphetamine to the informant's home, where they used methamphetamine together.

In her closing argument, the prosecutor urged the jury to find Acevedo guilty because he sold methamphetamine to the informant and because he was ready and willing to commit the crime. Acevedo's attorney argued to the jury that the informant, who was acting as an agent of the government, induced Acevedo into making a sale of methamphetamine because he knew Acevedo was in desperate need of a car.

The jury found Acevedo guilty on both counts. Acevedo filed a written motion for a judgment of acquittal or, in the alternative, a new trial on the ground that the evidence was insufficient to prove that he was not entrapped. *See* Minn. R. Crim. P. 26.03, subd. 18(3), 26.04, subd. 1. In May 2017, the district court denied the motion. The district court sentenced Acevedo to 95 months of imprisonment on count 1. Acevedo appeals.

## D E C I S I O N

### I. Sufficiency of the Evidence

Acevedo argues that the district court erred by denying his motion for judgment of acquittal because, he contends, the evidence is insufficient to prove that he was predisposed to commit the crime. We consider this argument first because, if it were meritorious, it would provide Acevedo with the most complete form of relief and would make it unnecessary to consider Acevedo's other arguments.

A district court should deny a post-trial motion for judgment of acquittal if "the evidence, viewed in the light most favorable to the State, is sufficient to sustain a conviction." *State v. Simion*, 745 N.W.2d 830, 841 (Minn. 2008). To determine whether the evidence is sufficient to sustain a conviction, we undertake a "painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to

the conviction, was sufficient" to support the jury's verdict. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). We "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

"A person is guilty of a controlled substance crime in the first degree if" the person "sells one or more mixtures of a total weight of 17 grams or more containing . . . methamphetamine." Minn. Stat. § 152.021, subd. 1(1). The statute defines "sell" to mean "to sell, give away, barter, deliver, exchange, distribute or dispose of to another." Minn. Stat. § 152.01, subd. 15a (2016).

Entrapment is a defense to a controlled substance crime. *See, e.g.*, *State v. Grilli*, 304 Minn. 80, 81, 87-96, 230 N.W.2d 445, 448, 451-56 (1975); *State v. Bauer*, 776 N.W.2d 462, 469-70 (Minn. App. 2009), *aff'd*, 792 N.W.2d 825 (Minn. 2011); *State v. Johnson*, 511 N.W.2d 753, 755 (Minn. App. 1994), *review denied* (Minn. Apr. 19, 1994).

> "Entrapment exists where it appears that officers of the law lured the accused into committing an offense which he otherwise would not have committed and had no intention of committing. However, the general rule is that it is not unlawful to provide a person with the opportunity to voluntarily and deliberately do what there was reason to believe he would do if afforded the opportunity."

*Grilli*, 304 Minn. at 88, 230 N.W.2d at 451-52 (quoting *State v. Poague*, 245 Minn. 438, 443, 72 N.W.2d 620, 625 (1955)). An entrapment defense gives rise to a two-step

procedure. First, "the defendant must raise the defense by showing by a fair preponderance of the evidence . . . that the government induced the commission of the crime." *State v. Vaughn*, 361 N.W.2d 54, 57 (Minn. 1985). To satisfy this initial burden, "the defendant must show 'something in the nature of persuasion, badgering, or pressure by the state.'" *Id.* (quoting *State v. Olkon*, 299 N.W.2d 89, 107 (Minn. 1980)). Second, if the defendant has satisfied his initial burden, the burden shifts to the state to "prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *Id.* The state may establish predisposition with evidence of a defendant's "active solicitation to commit the crime," a defendant's "prior criminal convictions," a defendant's "prior criminal activity not resulting in conviction," a "defendant's criminal reputation," or "by any other adequate means." *Olkon*, 299 N.W.2d at 107-08 (quotation omitted). "Other adequate means" may include a defendant's ready response to the government's solicitation. *Id.* at 108.

In this case, the district court determined during trial that Acevedo had satisfied his initial burden by showing that the state induced the commission of the crime. *See Vaughn*, 361 N.W.2d at 57. The key issue for the jury was whether Acevedo was predisposed to commit the offense. *See id.* In its post-trial order, the district court relied on Acevedo's own testimony about his prior use, possession, and sales of drugs and concluded that the evidence was "sufficient to support a determination by the jury that [Acevedo] was not entrapped because he was predisposed to sell and to possess methamphetamine."

The evidentiary record reveals that Acevedo had experience with methamphetamine because officers found methamphetamine and a methamphetamine pipe in Acevedo's pocket when they arrested him. In addition, Acevedo testified that he smoked

methamphetamine in the informant's car before being arrested. More importantly, Acevedo gave testimony in which he referred to the person from whom he acquired the methamphetamine as "my supplier" and referred to himself as a "middle man." He testified that selling methamphetamine is a "seasonal job" and that he does so "whenever . . . I need to make some money" because he is not employed in the winter time. This evidence is more than sufficient to prove that Acevedo was predisposed to commit the offense of which he was convicted.

Thus, the evidence is sufficient to prove that Acevedo was not entrapped and, therefore, is sufficient to support the jury's verdict of guilt.

## II. Admissibility of Other-Acts Evidence

Acevedo also argues that the district court erred by allowing the state to introduce other-acts evidence without conducting a *Spreigl* analysis. Acevedo challenges the admission of three particular types of other-acts evidence: (1) his testimony on cross-examination that he used, possessed, and sold methamphetamine in the past; (2) his testimony on cross-examination that he was arrested and charged in 2016 for possession of a controlled substance; and (3) the informant's testimony in the state's rebuttal case that Acevedo had sold methamphetamine to him on six or seven prior occasions.

Acevedo's argument is governed by a rule of evidence that provides as follows:

> Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless 1) the prosecutor gives notice of its intent

> to admit the evidence . . . ; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.

Minn. R. Evid. 404(b); *see also State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). This type of evidence is known in Minnesota as "*Spreigl* evidence." *See generally State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965). This court applies an abuse-of-discretion standard of review to a district court's admission of *Spreigl* evidence. *State v. Clark*, 738 N.W.2d 316, 345 (Minn. 2007).

Acevedo acknowledges that, "in entrapment cases, the trial court may allow in evidence that is traditionally excluded in criminal cases, namely, evidence of other convictions and prior bad acts." But he contends that an entrapment defense "does not relieve the trial court of its duty to examine each 'bad act' sought to be introduced and to rule on its admissibility." Acevedo concedes, however, that he did not request a *Spreigl* hearing or otherwise object to the three types of other-acts evidence. Accordingly, we apply the plain-error test. Under the plain-error test, an appellant is entitled to relief on an issue to which no objection was made at trial only if (1) there is an error, (2) the error is plain, and (3) the error affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects a defendant's substantial rights "if the error was

prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If these three requirements are satisfied, an appellant also must satisfy a fourth requirement, that the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014). If any requirement of the plain-error test is not satisfied, the appellate court need not consider the other requirements. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

The state argues that, because Acevedo did not object to the evidence he challenges on appeal, the relevant question is "whether the trial court erred by not *sua sponte* striking the disputed evidence." In support of this argument, the state cites *State v. Vick*, 632 N.W.2d 676 (Minn. 2001), in which the supreme court considered whether the district court committed plain error by admitting other-acts evidence "without adherence to the *Spreigl* procedural requirements." *Id.* at 684. The supreme court resolved the issue as follows:

> While Vick complains on appeal that [a particular witness's] testimony was admitted, the record does not demonstrate that the trial court was given any advance opportunity to consider the admissibility of [the witness's] testimony; the record reveals no pretrial motion or objection about the testimony and contains no transcript of an omnibus hearing. Accordingly, the question before us is not whether the trial court erred in admitting the testimony, because the court was not given the opportunity to make that decision. Instead, the precise question before us is whether the trial court's failure to sua sponte strike the testimony or to provide a cautionary instruction constituted plain error. The *Spreigl* notice was never made part of the record before the trial court, nor do the rules of criminal procedure require the notice to be made part of the record. Minn. R. Crim. P. 7.02. In the absence of an objection, then, we are hard pressed to see how the trial court could be attuned to whether [the witness's] testimony exceeded the scope of the *Spreigl* notice. Thus, there was no reason for

> the trial court to intercede sua sponte and, as a result, the trial court did not err in not striking [the witness's] testimony.

*Id*. at 685. The same reasoning applies to this case, even though the record indicates that both the state and the district court had some forewarning of Acevedo's entrapment defense. Without an objection by Acevedo, and in light of the special relevance of other-acts evidence in an entrapment case, the district court was under no duty to conduct a *Spreigl* analysis or to exclude any of the state's evidence *sua sponte*. *See id.* This reasoning is a sufficient basis for resolving Acevedo's challenge to the state's other-acts evidence.

Even if the *Vick* reasoning were not a sufficient basis for rejecting Acevedo's argument, we would reach the same conclusion by considering the circumstances surrounding the introduction of the three types of other-acts evidence that Acevedo challenges on appeal. The first type is Acevedo's testimony on cross-examination that he used, possessed, and sold methamphetamine in the past. This testimony was not prompted by the state but, rather, was voluntarily and gratuitously offered by Acevedo himself. The questions posed to him did not require him to give such expansive testimony. Acevedo nonetheless testified that he had "a supplier" and that he was a "middle man." The prosecutor did not immediately follow up on these self-inculpatory statements. She did so only after the district court ruled that Acevedo's entrapment defense would be submitted to the jury. The prosecutor then asked additional questions about how many times Acevedo had sold drugs. The prosecutor's follow-up questions were justified by the fact that Acevedo had "opened the door" to inquiry into his history of drug-dealing. *See State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007); *State v. Valtierra*, 718 N.W.2d 425, 435-36

(Minn. 2006). Acevedo answered the follow-up questions by providing additional self-inculpatory testimony that he has sold drugs on "a few" prior occasions and that he does so in wintertime as a "seasonal job" whenever he needs money. As a practical matter, the district court could not have prevented Acevedo from voluntarily and unexpectedly testifying to his prior bad acts, and the district court appropriately allowed the prosecutor to examine Acevedo further concerning those issues. Thus, the district court did not plainly err with respect to the first type of other-acts evidence that Acevedo challenges on appeal.

The second type of other-acts evidence that Acevedo challenges on appeal is his testimony on cross-examination that he was arrested in 2016 for possession of a controlled substance. This testimony was admitted after the district court had ruled that Acevedo could present his entrapment defense to the jury. The evidence is nonetheless subject to the procedural requirements of rule 404(b) and *Spreigl*. *See State v. Lynard*, 294 N.W.2d 322, 323-24 (Minn. 1980); *Grilli*, 304 Minn. at 81, 87-96, 230 N.W.2d at 448, 451-56. Assuming without deciding that the district court should have conducted a *Spreigl* analysis *sua sponte*, the lack of a *Spreigl* analysis did not affect Acevedo's substantial rights. Acevedo acknowledges that, to satisfy the third requirement of the plain-error test, he must show both that the evidence would have been deemed inadmissible if the district court had followed all applicable procedures and that the introduction of the evidence affected the jury's verdict. *See Griller*, 583 N.W.2d at 742-44. The admission of other-acts evidence "is particularly appropriate where the defendant has raised the defense of entrapment and the state seeks to establish that the defendant was predisposed to commit the offense." *State v. Starnes*, 396 N.W.2d 676, 680 (Minn. App. 1986). This particular type of other-

acts evidence (a prior drug-related arrest) is one type of evidence that a state may use to prove predisposition. *See Olkon*, 299 N.W.2d at 108 (stating that evidence of defendant's "prior criminal activity not resulting in conviction" may be introduced to prove predisposition) (quotation omitted). Accordingly, if the district court had conducted a *Spreigl* analysis, the district court likely would have ruled the evidence admissible. In any event, because Acevedo's arrest for possession of controlled substances is less meaningful than Acevedo's testimony that he previously had dealt drugs on multiple occasions, this evidence likely did not affect the jury's verdict.

The third type of other-acts evidence that Acevedo challenges on appeal is the informant's testimony in the state's rebuttal case that Acevedo had sold methamphetamine to him on six or seven prior occasions. This testimony also was admitted after the district court had ruled that Acevedo could present his entrapment defense to the jury. Assuming without deciding that the district court should have conducted a *Spreigl* analysis *sua sponte*, the lack of a *Spreigl* analysis did not affect Acevedo's substantial rights. The district court likely would have ruled this particular type of other-acts evidence admissible because it is highly relevant to the issue of predisposition. The evidence showed not just that Acevedo had sold methamphetamine generally but that he had sold methamphetamine to the informant specifically.

Thus, the district court did not plainly err by admitting the state's other-acts evidence.

## III. Assistance of Counsel

Acevedo last argues that he is entitled to a new trial on the ground that his trial attorney provided him with ineffective assistance of counsel.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. A criminal defendant's "'right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)). A defendant claiming a violation of his or her constitutional right to counsel must prove two things:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* at 687, 104 S. Ct. at 2064.

Acevedo argues that his trial attorney was ineffective because she did not object to the introduction of the state's other-acts evidence. As described above, the record reveals that the prosecutor did not intentionally elicit the first type of other-acts evidence in her initial cross-examination of Acevedo. Through his appellate counsel, Acevedo contends that his trial attorney "had a responsibility to [Acevedo] to object to this testimony and to seek a bench conference to determine the admissibility of the evidence or to move to strike

the testimony." But Acevedo does not elaborate by identifying the legal basis of the objection that should have been offered or by explaining why the district court likely would have granted a motion to strike. Thus, we cannot conclude that Acevedo's trial attorney's performance was deficient with respect to Acevedo's testimony about his prior experience selling drugs.

With respect to the second and third types of other-acts evidence, Acevedo's trial attorney could have asserted an objection based on rule 404(b) and *Spreigl*, either when the district court ruled that Acevedo's entrapment defense would be submitted to the jury or when the evidence was offered. Whether Acevedo's trial attorney was deficient in not doing so is immaterial because Acevedo cannot establish the second requirement of an ineffectiveness claim, that the deficient performance prejudiced his defense. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. As described above, even if the district court had conducted a *Spreigl* analysis, the district court likely would have ruled the evidence admissible. And even if the evidence had been deemed inadmissible, the absence of the second and third types of other-acts evidence likely would not have led to a different verdict. Acevedo had already testified that he had a "supplier," that he was a "middle man," and that he engaged in drug-dealing as a "seasonal job" "whenever" he needed income. Because that testimony already had been admitted, it is difficult to envision how any trial attorney could have persuaded the jury to find that Acevedo was not predisposed to commit the offense with which he was charged.

Thus, Acevedo is not entitled to a new trial on the ground that his trial attorney provided him with ineffective assistance of counsel.

**Affirmed.**